U. S. Electrical Motors, a Division of Emerson Electric Co. *and* International Association of Machinists & Aerospace Workers, AFL-CIO. Cases 26-CA-7458 and 26-RC-5823

May 28, 1982

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On January 22, 1981, Administrative Law Judge Robert C. Batson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge, as modified herein.

Respondent has excepted, *inter alia*, to the Administrative Law Judge's finding that Supervisor Philip Crosby orally promulgated an overly broad no-solicitation rule and to his finding that Derwood Brett, publisher-editor of the Mena Evening Star, was acting as an agent of Respondent in publishing on October 4, 1978,[3] an article and an editorial regarding the union activity at Respondent's Mena facility. For the reasons stated below we find merit in Respondent's exceptions to these findings.

Regarding the alleged promulgation of an overly broad no-solicitation rule, the credited testimony establishes that in the first part of June Supervisor Crosby told employee John Williams that he "realized that [Williams] was involved in the Union, and [Crosby] hoped that it wouldn't interfere with his inspection [duties], and he wouldn't be doing anything on Company time, involving in that." Although the Administrative Law Judge found that at all times relevant herein Respondent had in effect a valid written no-solicitation rule (and no exceptions have been taken to this finding), he also found, based upon the foregoing evidence, that Crosby had orally unlawfully broadened such rule. We do not agree. The record herein shows that later in the month of June, immediately following a second Crosby-Williams incident regarding solicitation while working, Williams was called into the office of Joe Monico, Crosby's immediate superior, and Monico explained Respondent's no-solicitation rule as follows: "that [he was] not allowed to solicit on Company time, but his break periods were his own time to do as he pleased." Thus, although both Crosby and Monico used the ambiguous term "Company time" in relating Respondent's no-solicitation rule, the fact that the rule as posted was valid in conjunction with the fact that any ambiguity in the oral rule was clarified by Monico within a relatively short period of time indicates that Williams could not reasonably have concluded that the rule prohibited solicitation during breaktime or other periods when employees were not actually at work. Accordingly, we conclude that the General Counsel has failed to establish that Respondent promulgated an overly broad no-solicitation rule, and, therefore, we will dismiss this aspect of the complaint and amend the Administrative Law Judge's Conclusions of Law and recommended Order accordingly.

Regarding the alleged agency status of Brett in publishing the October 4 article and editorial, the credited testimony establishes that Jim Montgomery, the Mena plant manager, attended a Lions Club luncheon in September and was asked to speak about the rumors that the plant might close. After asking not to be quoted, Montgomery summarized the economic problems which Respondent faced. Montgomery was asked if the union activity at the plant had any bearing on its closing and Montgomery responded that "those were two separate problems" but that in his opinion the Union was not needed since the campaign was causing dissension and diverting everyone's attention away from solving their operational problems. Immediately after this meeting Brett approached Montgomery and requested permission to publish an article based upon his remarks; Montgomery denied permission until he could check with Respondent's attorneys. Early during the week of the election herein, Montgomery contacted Brett and gave him permission to publish an article based upon his Lions Club remarks. The publication of this article and the editorial coincided with the meetings held with the employees by Montgomery and Russ Hale, president of Respondent, wherein the unlaw-

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] The Administrative Law Judge inadvertently failed to include in his Conclusions of Law a provision paralleling his finding that Respondent violated Sec. 8(a)(1) of the Act by Supervisor Danny Titsworth's threat to employee Paul Herrman that he would be disciplined if any additional employee complaints were received regarding Herrman's union solicitations. Inasmuch as we agree that such threat unlawfully conditions Herrman's protected activity on the receptiveness of his fellow employees, we will amend the Administrative Law Judge's Conclusions of Law accordingly.

[3] All further dates herein refer to 1978 unless otherwise specified.

ful theme of strike violence and the inevitability of the plant closing because of the Union was developed.

Based upon the foregoing evidence and the fact that the theme of the October 4 article and editorial paralleled the theme of the remarks made to employees by Montgomery and Hale, the Administrative Law Judge found that Brett was acting as an agent of Respondent in publishing the article and editorial. We do not agree. Pivotal to the existence of any principal-agent relationship is that the agent be authorized to act *on behalf of* the principal.[4] In the instant matter, there is no showing that Brett was authorized to publish the October 4 article and editorial on behalf of Respondent. Brett is the editor and publisher of a daily newspaper whose business is to investigate and report on newsworthy issues. Clearly, the undisputed economic problems facing Respondent which Montgomery related "off the record" in his Lions Club remarks constitute such an issue. Thus, when Brett sought permission to publish an article based upon this "off the record" information, he was acting in his own interest and merely was following a procedure standard in the newspaper industry regarding information received "off the record." Furthermore, it is clear that Montgomery's Lions Club remarks contain none of the allegedly unlawful statements of the October 4 article and editorial and there is no showing that Respondent was aware of such statements prior to their publication. Thus, when Montgomery granted Brett permission to publish an article based upon his Lions Club remarks, he merely was removing the self-imposed condition that his remarks regarding Respondent's economic problems not be quoted. Finally, the record herein shows that on October 5, the day before the election herein, Brett published the Union's rebuttal on the front page of the newspaper. Although we by no means condone the statements made by Brett in the October 4 article and editorial, in view of the foregoing evidence, we find that the General Counsel has failed to establish that Brett was acting as an agent of Respondent in publishing the same[5] and, therefore, we will dismiss this aspect of the complaint.

Finally, regarding the Administrative Law Judge's recommended Order, we note that paragraphs 1(g) and 2(c) thereof address matters which should be set forth separately from the provisions remedying Respondent's unfair labor practices. Additionally, the Administrative Law Judge inadvertently failed to provide injunctive relief paralleling his finding that Respondent unlawfully threatened its employees that they would be subject to discipline for alleged violations of its no-solicitation rule based solely upon complaints from other employees. Lastly, we note that, in some respects, the notice to employees fails to track the provisions of the recommended Order. Accordingly, we will amend the Administrative Law Judge's recommended Order in these respects.

[4] Restatement (Second) of Agency § 1 (1957).

[5] Moreover, in view of the Union's October 5 rebuttal and the record as a whole, we find that the October 4 article and editorial did not create a general atmosphere of fear and coercion so as to render the conduct of a free election impossible. See *National Electric Coil Div. McGraw-Edison Company*, 184 NLRB 691 (1970).

AMENDED CONCLUSIONS OF LAW

Substitute the following Conclusion of Law for the Administrative Law Judge's Conclusion of Law 2:

"2. By interrogating its employees concerning their union membership, activities, and desires; by threatening its employees, directly or by implication, that it would close its Mena plant if the Union were selected as its employees' collective-bargaining representative; by threatening its employees, directly or by implication, that the selection of the Union at its Mena plant would inevitably result in strikes and violence; by threatening its employees that it would be futile for them to select the Union to represent them by telling them that it would not bargain in good faith with the Union; and by threatening its employees that they would be subject to discipline for alleged violations of its no-solicitation rule based solely upon complaints from other employees, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, U. S. Electrical Motors, a Division of Emerson Electric Co., Mena, Arkansas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating its employees concerning their membership in, activities on behalf of, or desires regarding the International Association of Machinists & Aerospace Workers, AFL-CIO (IAM), or any other labor organization.

(b) Threatening its employees, directly or by implication, that it would close its Mena plant if the IAM, or any other labor organization, were selected as its employees' collective-bargaining representative.

(c) Threatening its employees, directly or by implication, that the selection of the IAM, or any

other labor organization, at its Mena plant would inevitably result in strikes and violence.

(d) Threatening its employees that it would be futile for them to select the IAM, or any other labor organization, to represent them by telling them that it would not bargain in good faith with said labor organization.

(e) Threatening its employees that they will be subject to discipline for alleged violations of its no-solicitation rule based solely upon complaints from other employees.

(f) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at its Mena, Arkansas, plant copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 26, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint, insofar as it alleges violations not found in the Administrative Law Judge's Decision, as modified herein, be, and it hereby is, dismissed.

IT IS FURTHER ORDERED that the election conducted on October 6, 1978, in Case 26-RC-5823 be, and it hereby is, set aside and said case is hereby remanded to the Regional Director for Region 26 for the purpose of conducting a second election at such time as he deems appropriate.

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

[6] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT coercively interrogate our employees concerning their membership in, activities on behalf of, or desires regarding the International Association of Machinists & Aerospace Workers, AFL-CIO (IAM), or any other union.

WE WILL NOT threaten our employees, directly or by implication, that we would close our Mena plant if the IAM, or any other union, were selected as our employees' collective-bargaining representative.

WE WILL NOT threaten our employees, directly or by implication, that the selection of the IAM, or any other union, at our Mena plant would inevitably result in strikes and violence.

WE WILL NOT threaten our employees that it would be futile for them to select the IAM, or any other union, to represent them by telling them that we would not bargain in good faith with said Union.

WE WILL NOT threaten our employees that they will be subject to discipline for alleged violations of our no-solicitation rule based solely upon complaints from other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed by Section 7 of the Act.

U. S. ELECTRICAL MOTORS, A DIVISION OF EMERSON ELECTRIC CO.

DECISION

STATEMENT OF THE CASE

ROBERT C. BATSON, Administrative Law Judge: This consolidated proceeding under the National Labor Rela-

tions Act, as amended, 29 U.S.C. § 151, *et seq.* (herein called the Act), was heard before me in Mena, Arkansas, based on an order consolidating cases and complaint and notice of hearing, issued by the Regional Director for Region 26, on February 22, 1979, arising out of a charge filed by International Association of Machinists & Aerospace Workers, AFL-CIO, herein called the Union, on October 17, 1978,[1] and amended on November 17, and objections to the election in Case 26-RC-5823, filed by the Union on October 11, alleging that U. S. Electrical Motors, a Division of Emerson Electric Co., herein the Respondent or Employer, had violated Section 8(a)(1) of the National Labor Relations Act, as amended (herein called the Act), and committed certain conduct which warranted setting aside the election conducted on October 7 and the direction of a new election.

The complaint alleges that Respondent violated Section 8(a)(1) of the Act in numerous particulars by the conduct of its supervisors between June 8 and October 4. The petition for Certification of Representative in Case 26-RC-5823 was filed by the Union on July 26. A Stipulation for Certification Upon Consent Election in an appropriate unit[2] was approved by the Regional Director for Region 26, on August 21, pursuant to which a secret-ballot election was conducted among the employees in the unit on October 6, which resulted in a tally of ballots reflecting that of 441 eligible voters, 200 cast valid ballots for, and 213 cast valid ballots against, the Union. Nine ballots were challenged. As a result of the investigation of the Union's timely filed objections on November 21, the Regional Director issued his Report on Objections, recommending that Objections 1, 9, and 14 be overruled and the remainder of the objections (Objections 2 through 16) be consolidated with the complaint herein for hearing. On January 12, 1979, the Board adopted these recommendations.

All parties were represented at the hearing by counsel or other representatives and were afforded full opportunity to participate by presenting evidence and testimony, to examine and cross-examine witnesses, to make oral argument, and to file post-hearing briefs. A brief has been received from counsel for the Respondent. The counsel for the General Counsel did not file a brief, but made oral record argument.

Upon the entire record in this case,[3] including my observations of the testimonial demeanor of the witnesses testifying under oath, and upon substantial reliable evidence, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent is, and at all times material herein has been, a corporation doing business in the State of Arkansas, with an office and place of business located in Mena, Arkansas, where it is engaged in the manufacture and sale of electrical motors. During the 12-month period preceding the issuance of the complaint herein, Respondent sold and shipped from its Mena, Arkansas, plant products valued in excess of $50,000 directly to points located outside the State of Arkansas.

The complaint alleges, the Respondent admits, and I find that at all times material herein the Respondent was an employer as defined in Section 2(2) of the Act, and engaged in commerce and in activities affecting commerce as defined in Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the Respondent admits, and I find that the Union herein is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Disposition of Some Objections*

The Petitioner's Objections 2, 3, 4, and 5 on their face allege conduct occurring prior to the filing of the petition in Case 26-RC-5823, and are therefore outside the critical period and may not be considered as objectionable conduct for the purpose of setting aside the election. *Goodyear Tire & Rubber Co.*, 138 NLRB 453 (1962). No evidence was submitted in support of Objections 2 and 5. Evidence was presented in support of Objections 3 and 4 which are co-extensive with the complaint allegations. In accordance with well-settled Board law, this evidence will be considered in assessing the impact of the Employer's conduct during the critical period. Objections 2, 3, 4, and 5 must be overruled, and they hereby are dismissed.

No evidence was submitted in support of Objections 6, 8, 16 and the portion of Objection 13 alleging the conduct of a Jack Robock. The conduct alleged in these objections are not coextensive with any complaint allegation. Accordingly, Objections 6, 8, and 16 and that the portion of Objection 13 relating to the conduct of Robock are hereby overruled and dismissed.

Objections 7, 10, 11, 12, and 15 and that the portion of Objection 13 alleging conduct of the Employer's president, Russ Hale, are coextensive with the complaint allegation and are the only objections now before me for consideration.

B. *Background*

U. S. Electric Motors (hereafter USEM) consists of five plants and is 1 of 40 to 50 divisions of Emerson Electric Co. The five plants making up the USEM division are located in Mena, Arkansas (the plant here involved); Philadelphia, Mississippi; Durant, Oklahoma; Los Angeles, California; and Prescott, Arizona. The employees of the plant at Prescott have been represented by the International Brotherhood of Electrical Workers for about 14 years and the employees of the plant at Los Angeles has been represented by a Teamsters local union for more than 10 years. The employees at the other three plants are not represented by a labor organization.

The president of USEM, at times material herein, was Russ Hale, who assumed that job on April 7. Hale is re-

[1] All months and dates hereafter are 1978 unless otherwise indicated.

[2] The unit is not identified in the record.

[3] The official transcript of these proceedings is replete with errors, most of which are typographical and include misspellings and "phonetic" spelling. The Respondent filed a motion to correct the transcript with respect to most such errors. The motion is hereby granted and the transcript is corrected as requested therein. The motion is hereby made a part of the official record.

sponsible to, and directly supervised by, William Rutledge, vice chairman of the board of directors of Emerson Electric Company. The Respondent contends that Hale was recruited for that job because of his proven management capabilities and the fact that USEM was in serious trouble due to declining profits since 1975. Shortly after assuming the presidency of USEM, on April 11 and 12, a divisional planning conference was held at Milford, Connecticut, USEM's headquarters, wherein it was determined that overcapacity, which was defined as "maintaining more plant space and production capacity than was being used," was one of the major factors contributing to USEM's problems. At that conference USEM's vice president of manufacturing, Maurice Tisdale, presented a proposal that the Los Angeles plant be closed and its production be divided among the remaining four plants. According to the Respondent, this proposal was rejected because its new president had not been involved in the planning and that the proposal may have been too hastily drawn without sufficient study and consideration. At this conference it was decided to employ outside experts to study these operational problems and make recommendations for a solution.

The background set forth above is based on unchallenged evidence and testimony, primarily the testimony of Russ Hale, presented by the Respondent. Neither the General Counsel nor the Charging Party presented any evidence in conflict with that of the Respondent and apparently do not contend that the operational problems outlined by the Respondent are other than valid. The Respondent contends that it is necessary to consider this background, all of which preceded the advent of any union activity at Mena, which commenced on May 13, in order to assess whether or not its subsequent conduct, specifically telling the employees the Mena plant might be closed, was unlawful.

According to the Respondent, it took several months to implement the plans made at the Milford conference in April to obtain a competent consultant from outside Emerson management to study the problems of USEM and present a solution. In early August the Respondent hired James D. Sutton, whom it contends by virtue of education and experience was uniquely qualified, to study and solve the problems of USEM. Russ Hale testified that he advised Sutton that in his opinion the only solution to the Respondent's problems was to close one of the five plants and he should direct his efforts toward determining which plant to close.

Shortly thereafter, August 27, 28, and 29, Emerson held its corporate planning conference in St. Louis, Missouri, which involved all divisions and subsidiaries of Emerson. According to Hale, the theme of the conference was to "fix the losers"; i.e., identify the divisions with problems and devise a program to correct such problems. If this could not be done Emerson "may decide to divest itself of the loser." Hale testified that, much to his surprise, USEM was cited throughout the conference to the other divisions as a bad example, and that he privately received severe personal criticism from Emerson's top management.

Prior to leaving St. Louis, Hale sent telegrams to the plant managers of his five plants scheduling a meeting with them and their staffs for August 31 in Milford, Connecticut. The Mena plant manager, Jim Montgomery, and several of his staff attended this meeting at which Hale relayed to them the data he had been given at St. Louis which reflected that in USEM production costs were up although production was down 4 to 5 percent. On-time deliveries had decreased 9 percent and scrap and costs of rework was up to 18 percent and the inventory of USEM constituted about one-half of its total assets. According to Hale, the Philadelphia plant had shown consistent improvement and the Durant plant was acceptable except in quality. The efficiency of the other three plants was poor with Mena falling the lowest in almost all areas. He advised those in attendance that it appeared that at least one and possibly two of its plants would have to be closed and with the exception of the Philadelphia plant that the ax could fall on any of the remaining four plants. Hale testified that there was no mention of the union activity at Mena, or the unions representing the employees at Prescott and Los Angeles. Hale, as did Mongomery, testified that Hale instructed the plant managers to advise all personnel in their plants of these problems and seek their assistance in helping to solve them.

The unfair labor practices attributed to Hale, Montgomery, and Derwood Brett, editor-publisher of the Mena Evening Star, herein alleged to be an agent of Respondent, as set forth in paragraph 8 of the complaint and the conduct of Montgomery as set forth in paragraph 9(a) of the complaint arises directly out of this background.

C. *The Respondent's Campaign*

Whether the operational problems at USEM, and particularly at the Mena plant, were real or, as the General Counsel suggests, concocted as a vehicle of disguised threats to close the Mena plant is not critical to the ultimate resolution of the complaint allegations based thereon. I am pursuaded by the record evidence that USEM had problems and there was some urgency to solve these problems for it to be a profitable division of Emerson. However, unchallenged record evidence also conclusively establishes that the Respondent seized upon these problems to interfere with, restrain, and coerce its employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.

According to the testimony of Montgomery, he returned to Mena, the day following the Milford conference and telephoned Robert Partain, personnel manager at the Durant plant and acting industrial relations manager at the Mena plant, requesting that he come to Mena and assist in solving the Respondent's problems. Partain advised Montgomery that at the relatively small Durant plant (150 employees), the Respondent was holding meetings with all the employees and advising them of the Respondent's precarious situation. Partain agreed to come to Mena late on Wednesday following the meeting with all the Durant employees.

When Partain arrived at Mena, Montgomery called a meeting of his management staff and advised them of the problems at Mena as he had learned at the Milford meet-

ing. The following day, September 6, Montgomery and Partain assembled all the Mena employees, unit and nonunit, by shifts and told them bluntly that the Mena plant was one of four in USEM that was under consideration for closing unless it became profitable to Emerson. Montgomery identified five particulars: productivity; quality; tooling; maintenance; and energy conservation, in which the plant needed to improve and solicited employees to volunteer to serve on employee committees in one of these areas. Montgomery did not allude to the union activity at the Mena plant at this meeting, but couched the possibility of its closing solely in economic terms.[4] According to Montgomery, about 85 percent of the Mena employees participated in this program and he received more than 600 suggestions. Montgomery testified that the response of the employees was so great that he and his staff were not competent to analyze and coordinate the program. He contacted Bill Roof, an industrial engineer of some 30 years' experience with Emerson, and solicited his assistance in coordinating this program.

When Roof arrived at Mena, the decision was made to give the employee participation program, which has been used at other USEM plants, a name. Roof suggested, and Montgomery adopted, T.I.P., total improvement program, as the name. Thereafter the employees participating in the program met in groups by shifts.

The complaint alleges that Montgomery's telling the employees on September 6 that the Mena plant could be closed and his inviting them to participate in the program to help solve the problems constituted an unlawful threat to close the plant because of the union activity and a solicitation of employee grievances with an implied promise to rectify them. While there is a strong suspicion that the Respondent seized upon the asserted precarious status of the plants in USEM to engage in the scare tactics suggested here in order to interfere with the employees Section 7 rights, I am pursuaded that Montgomery's remarks on September 6 and the subsequent involvement of the employees in the T.I.P. program did not violate Section 8(a)(1). Although the election had been scheduled at that time and the Respondent was aware that the union activity was peaking, Montgomery carefully avoided mentioning the Union or the election in connection with possible reasons for the closing. The same is true with subsequent meetings involving development of the T.I.P. program. When matters were brought up which might constitute a grievance, i.e., a cut in labor grade, they were dismissed as being outside the scope of the five problem areas with which the Respondent was concerned.

The complaint alleges that, in speeches to all employees on October 3, Montgomery threatened plant closure because of the union activity and implied the inevitability of strikes and violence if the employees selected the Union, and that Russ Hale threatened plant closure because of the union activity in speeches to all employees on October 4. In the same vein it is alleged that the Respondent's agent, Derwood Brett, threatened plant closure in an article and editorial published in the Mena Evening Star on October 4.

In order to assess the impact of the conduct alleged here which constitutes a theme of clear unlawful interference, restraint, and coercion of the employees Section 7 rights, it is necessary to set forth some intervening events. A week or so after returning from Milford, Montgomery attended a local Lions Club meeting where he was asked to comment on rumors that USEM's Mena plant might be closed. After asking that his remarks not be quoted, based on the testimony of Montgomery and Brett, Montgomery told the group essentially what he had told the employees concerning the reasons for possible closure and the steps being taken to try to avoid it. Montgomery was asked if the union activity at the plant had any bearing on its closing. According to Montgomery, he told them "those were two separate problems and that one had no bearing on the other." However, Montgomery continued that in his opinion the Union was not needed since the campaign was causing dissention and diverting everyone's attention away from solving their operational problems. Montgomery added that the important question was not whether or not there was a union, but whether they could solve their problems.

Immediately after this meeting, Derwood Brett, publisher-editor of the Mena Evening Star, requested permission to publish an article based on Montgomery's remarks. Montgomery denied permission until he could check with his corporate attorneys. It was not until early during the week of the election that Montgomery authorized Brett to publish an article based on his remarks. The publication of this article and the editorial coincided with the meetings held with the employees by Montgomery and Hale wherein the theme of strike violence and the inevitability of the plant closing because of the Union was developed.

On the front page of the October 4 edition of the Mena Evening Star under Brett's byline, he published an article headlined, "Beginning January 1, 1979 U.S. MOTORS MAY CLOSE." The article does not mention Montgomery but purports to quote L. L. Morrow, who appears to be a member of the Mena Industrial Development Board, and was instrumental in persuading Emerson to build the plant at Mena. While the article deals largely with the prospect that the plant would very likely close for economic reasons and the impact it would have on the community, Morrow is quoted as saying, "U.S. Motors might not be able to 'turn this thing around' with the problems they are having with efforts to unionize the plant. I can really see no good the union would do out there. We see regularly in the press where violence and turmoil is normal for union operations nowadays." In the same edition Brett published an editorial dealing in large part with the theme that unionization of the Mena plant would inevitably lead to strikes and violence and the closing of the plant. He stated, "the

[4] Many witnesses testified regarding this September 6 meeting, only two of which, Kenneth Halcumb and Stanley House, testified that Montgomery injected the union activity at Mena into his remarks. Neither Halcumb nor House was certain that it was this meeting rather than a later one where Montgomery made the remarks attributed to him. The preponderance of record evidence convinces me that there was no suggestion or mention of the Union at this meeting.

issue is more than union or no union—it could be plant or no plant."

Prior to dealing with the General Counsel's contention that Brett was acting as Respondent's agent in publishing these items which constitute an unlawful threat of plant closure, or, in the alternative, this was third-party conduct which the Respondent had a duty to disavow, a discussion of the October 3 and 4 meetings with the employees may be helpful. There is little dispute concerning the October 3 meetings with the employees which were conducted by Montgomery and Industrial Relations Manager Robert Partain. Essentially all the unit employees were summoned in groups of about 30 to the south conference room where Montgomery and Partain addressed them concerning the Union and the forthcoming election. Displayed around the room were numerous posters, newspaper clippings, and pictures dealing with strikes, violence, and plant closures, particularly the closing of a plant in Shelbyville, Tennessee. While the record is not clear, it appears that at each of these meetings Montgomery's opening remarks were to the effect that he could be spending his time better trying to solve the plant's problems and keep it open, but that it was necessary for him to talk about the Union. He told them if the Union came in he would have to divide his time between preparing for negotiations and solving their problems to keep the plant open. He and or Partain alluded to the posters and newspaper clippings and stated that of the 18 Emerson plants that had been closed 13 were Union. There was a poster outlining the length of strikes by I.A.M. at Emerson plants and Montgomery told them that I.A.M. had to strike for every contract that it had gotten at an Emerson plant.[5] In at least one meeting, in response to an employee's question as to whether the plant would close if the Union came in, Montgomery said the "question in Mena was not union or no union but plant or no plant."

On October 4, USEM's president, Hale, addressed the employees on each of the three shifts, as did two other company officials. Hale talked about the Company's operational and financial problems, and alluding to a union handbill stating that the Company's T.I.P. program was just "sweet talk," a "sham," and "a psychological trick," asked the employees if I.A.M. were the type of Union that would help or hurt them. He stated that it was a bad time for the I.A.M. to try to organize the Mena plant, that he had enjoyed coming to Mena and meeting the people, but if he had to make the decision to close the plant he would make it.[6]

As indicated above, it appears that with the exception of a number of alleged instances of individual interrogation and threats discussed below, the Respondent did not engage in any organized campaigning until the week of the election. However, for a month prior to the election management officials had been telling the employees that it must improve its profit factor or there was a possibility that the Mena plant might be closed for economic reasons. As found above, there is some evidence supporting the Respondent's contention that the Mena plant was unprofitable and would have to improve in order to remain open. The newspaper article and editorial, and the comments of Hale and Montgomery, here under consideration, must be assessed in the context of Respondent's operational problems.

The newspaper article and editorial, as did Hale and Montgomery, stated that if the plant closed it would be for economic reasons. The central theme of these written and oral statements clearly conveys the threat that the election of union representation at USEM in Mena would inevitably bring strikes and violence and just as inevitably lead to the closing of the Mena plant. The lip service paid to closing for economic reasons does not disguise these threats. I am convinced, and I find, that the Respondent exaggerated the plight of the Mena plant as a vehicle to threaten its employees with plant closure if the Union won the election. The statement to the effect that in Mena the question was more than union or no union, but plant or no plant, which was apparently coined by Montgomery at the September Lions Club meeting and used by Brett in his editorial and again by Montgomery in his meetings with the employees on October 3, can leave no doubt in an employee's mind that selection of the Union at Mena places his job in great peril. It is well settled that such "serious harm" statements tend to coerce employees in the exercise of their Section 7 rights. *Community Cash Stores, Inc.*, 238 NLRB 265 (1978). Cf. *Chrysler Airtemp South Carolina, Inc.*, 224 NLRB 427 (1976).

Turning to the question of whether Derwood Brett was acting as an agent of Respondent in his October 4 publication, and, if not, whether Respondent had a duty to disavow the statements. On the facts here, I find that Brett was acting as an agent of the Respondent in the conduct of the Respondent's campaign. First, Montgomery addressed the Lions Club in early September but declined to give Brett permission to publish an article based on his remarks until the week of the election which coincided with the Respondent's campaign.[7] From reading the article Brett published, one might ponder why Brett sought Montgomery's permission, since the article does not quote or mention Montgomery or attribute any of the statements to him. It is clear that Montgomery gave Brett permission to print something, apparently without reserving and right to review the article before publication. The theme of the article and editorial are identical with the theme of the remarks made to the employees by Montgomery and Hale on October 3 and 4. Thus, far from disavowing the import of these printed articles, the Respondent accentuated the threats in its October 3 and 4 meetings. See *Hamburg Shirt Corporation*, 156 NLRB 511, 523 (1965), wherein the administrative law judge cited the Supreme Court's language in *International Association of Machinists; Tool and Die Makers Lodge No. 35 [Serrick Corp.]* v. *N.L.R.B.*, 311 U.S. 72, 80 (1940):

[5] The Respondent argues that this was in response to the Union's claim that it secured 98 percent of its contracts without a strike.

[6] I have not endeavored to set forth all versions of the eight employee witnesses and that of Montgomery and Hale, with respect to this meeting. The findings as to what Hale said at these meetings made above are not in dispute. Only one witness, Cogburn, testified that Hale made the direct statement that if the Union came in he would close the plant. I do not credit Cogburn in this respect.

[7] Brett testified that he would have published the article even without Montgomery's permission.

> The employer . . . may be held to have . . . [violated the Act] even though the acts of the so-called agents were not expressly authorized or might not be attributed to him on strict application of the rules of *respondent superior*. We are dealing here not with private rights . . . nor with technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants, but with a clear legislative policy to free the collective bargaining process from all taint of an employer's compulsion, domination, or influence.

Accordingly, I find that as alleged the October 4 publication of the news article in the Mena Evening Star, as discussed above, and by Montgomery's and Hale's statements to the employees on October 3 and 4, respectively, Respondent unlawfully threatened its employees with plant closure, and it further coerced its employees in October by Montgomery's telling them that the "union had a 100 percent strike record with the Respondent and implied that if the employees voted the union in violence would result."

The complaint alleges that Respondent by its supervisor, Philip Crosby, about June 16, and its supervisor, Danny Titsworth, during August, promulgated and enforced an overly broad invalid no-solicitation rule, and that Titsworth threatened to take disciplinary action for violating the rule. The Respondent contends that it had maintained a valid no-solicitation rule for a number of years and that employees were advised of the rule when they were hired and the rule had been posted on its bulletin board. Received into evidence is a copy of the purported rule:

> We all know that no matter what issue is involved, unwanted solicitations during working time can result in irritation and personal inconvenience. In addition, where such activity takes place during working time, we feel that there can be an adverse effect on production. Accordingly, to maintain harmony and cooperation and avoid any confusion as to the meaning of our current solicitation-distribution rule, the following revision has been adopted.
>
> *No-Solicitation/No-Distribution*
>
> Employees will not be permitted to sell or solicit in any plant area during their working time. Employees will not be permitted to distribute circulars, handbills of literature of any type during their working time or at any time in any working area of the plant.
>
> /s/ Jim Millspaugh
> Industrial Relations Manager

The only evidence as to when this rule and its explanation were promulgated was based on the fact that it was signed by Jim Millspaugh, industrial relations manager, who had left the Company more than a year before the advent of the Union. There is no evidence that the rule was ever enforced. However, as argued by the Respondent in its brief, there is no evidence that the rule was ever violated. While two employee witnesses testified that they had never seen, or been informed of, the rule, it appears that the General Counsel is not contesting the existence or validity of the written rule. Rather, these allegations are predicated upon testimony of oral communications of an invalid rule.

In mid-June, John D. Williams, a patrol inspector with the Respondent, was inspecting parts on the veridisc and talking with employee Thomasson, as he (Williams) was making notes of his inspection on a small note pad with an I.A.M. logo. He was observed by Supervisor Philip Crosby, who testified that he thought the note pad was a union card and that Williams was soliciting Thomasson to sign the card. Crosby approached Williams, who quickly put the pad in his shirt pocket and went to a parts basket and began checking parts. According to Williams, Crosby came up to him and told him he would regret having to let him go for passing out union cards, but that is exactly what he would do if he caught him again. Williams initially testified that he immediately denied that he was passing out union cards. However, on cross-examination, and in agreement with Crosby's testimony, it was not until the following day that he went to Crosby and denied passing out cards and explained what he was doing. Both Crosby and Williams testified that Williams told Crosby that he was protected by the "National Labor Laws." Apparently the day of the incident, Crosby reported it to General Foreman Joe Monaco, and looked at the section of the Act referred to by Williams. The following day Williams denied to Crosby that he had union cards and explained what he was doing. Crosby took Williams to Monaco's office where Williams gave the same explanation. Both men then apologized to Williams for the incident.[8]

Williams denied that he had seen or was aware of a no-solicitation rule except that some employees had informed him of such rule.

Employee Paul Herrman testified that about mid-June, or 6 weeks after the union campaign started, Supervisor Danny Titsworth came to him and told him he was going to have to give him a warning. Titsworth told him the Company had a no-solicitation rule and he could not solicit on company time. He denied soliciting except during lunchbreaks and after work. Titsworth told him he could not solicit during breaks since the Company continued to pay for that time. Titsworth told him he had received a number of complaints about his talking to people and if it continued he would have to punish him.

According to Titsworth, he received complaints from two new employees that Herrman was talking with them about the Union in the shop. He then went to Herrman and explained the no-solicitation rule and that he could not solicit "during the time we were supposed to be working." Herrman denied that he had engaged in any solicitation and asked Titsworth if he were accusing him of such. Titsworth told him no but, if he received any

[8] The foregoing is not in dispute except that, by Crosby's version of the incident, he merely asked Williams not to put him on the spot by soliciting in the plant on company time. He denied that he threatened any disciplinary action. I agree with the Respondent that it makes little, or no, difference which version is credited. By Williams' version there is a direct threat of punitive action, and by Crosby's there is a clearly implied threat of such action.

more complaints, he would have to take disciplinary action.

First, I am convinced and find that Respondent had in effect the valid no-solicitation rule set forth above. Neither Williams nor Herrman was impressive witnesses. As noted above, Williams initially insisted that he immediately denied to Crosby that he was soliciting, and it was not until Respondent's attorney extracted from Williams the admission that on the day before the hearing, during an interview with him, Williams had told him for the second time that it was not until the next day that he made such denial, that Williams changed his testimony to comport therewith. Furthermore, Williams testimony appeared, at times, to be confused, possibly due to the fact that he had little present recollection of what had occurred the previous June. With respect to Herrman, his memory of the events to which he testified appeared to be vague. His denial of any knowledge of a no-solicitation rule has some doubt cast upon it by his testimony that he denied to Titsworth that he was talking about union except at lunch and after work. Be that as it may, the testimony of Crosby, Titsworth, and other management officials that such rule had been in existence for several years and employees had been informed of the rule upon hire and by posting in the plant, is more persuasive, and I so find.

Turning first to the Crosby-Williams incident. I find the General Counsel has not proven the allegations of paragraphs 14(a) and (b) of the complaint which this evidence was designed to support. From what the undisputed facts demonstrate, I find Crosby had reasonable cause to believe that Williams was violating the no-solicitation rule. The note pad upon which Williams was writing was similar to the I.A.M. authorization cards. Upon Crosby's approach, Williams rapidly concealed the note pad and departed Thomasson's company. These acts could reasonably appear to indicate that Williams had something to hide. Williams' failure to immediately deny solicitation, but instead alluding to protection by "National Labor Laws" could reasonably further indicate that Williams was engaged in union activity. On these facts, Crosby's telling Williams that he would regret having to let him go for passing out union cards, and that's what he would do if he caught him again, is not a violation of the Act.

In *Hildebrand Company*, 198 NLRB 674 (1972), cited by the Respondent, the Board held that Respondent did not violate the Act when, upon recalling a laid-off employee, it read him the following message:

> When you were here last, we were advised by some of the employees that you were soliciting cards and discussing union matters during working hours. You were told during a warehouse meeting that union problems could be discussed at any time except during working hours. Since you did not heed this policy, I must tell you that we are glad to have you back on the job but must advise that if you work on union matters during working hours when you are paid to do work for the company, that we will consider this cause for discharge.

The Board, reversing the Administrative Law Judge, concluded that the above statement did not violate the Act, but was merely a statement that it would police the rule against violations. This conclusion was apparently predicated upon the rationale that where an employer has reasonable cause to believe that an employee has violated its rule, here based on reports by other employees, that it may advise the employee that violations will be considered cause for discharge.

Accordingly, when Crosby had reasonable cause to believe that Williams was in violation of the rule, his statements to him to the effect that he would regret firing him for such activity but would do so if he caught him again are not unlawful.

Now for consideration of the Titsworth-Herrman incident. I consider Titsworth's denial that he told Herrman that he could not talk about the Union during breaks to be far more credible than Herrman's testimony to the contrary. Based on employee reports that Herrman was talking about the Union in the shop, under the rationale of *Hildebrand, supra*, Titsworth's reminding Herrman of the no-solicitation rule does not violate the Act. However, Titsworth's telling Herrman that if he received further complaints he would have to take disciplinary action is unlawful and tended to coerce Herrman in the exercise of his Section 7 rights. The distinction, as I perceive it, between Titsworth's threat to take disciplinary action and the statements made by Crosby and the supervisors in *Hildebrand*, is simply that Titsworth threatened disciplinary action based on employee reports and not based on a determination that Herrman had in fact violated the rule.

Accordingly, I find the threat to be a violation of Section 8(a)(1) as alleged.

The complaint alleges that, on or about October 4, Supervisor Joe Simmons threatened employees with plant closure because of their support for the Union. A short time before the election, employee Roy Cogburn's supervisor, Joe Simmons, approached Cogburn at his work station and asked him if he had read the company literature mailed to him concerning the Union. Cogburn told him he had, and, on being asked what he thought about it, told Simmons he "thought it was all a fairy tale, and [I] didn't believe it." Simmons told Cogburn that the Union did not care anything about him, "they're just a business." Simmons then asked Cogburn what he thought the Union could do for him and Cogburn spelled out several benefits which he thought the Union could get. Simmons told Cogburn the Company would not negotiate for those benefits, but would close first. Simmons continued by asking Cogburn if he would vote for the Union if it meant everybody's job at the plant. Cogburn responded that he did not believe that it did.[9]

Simmons admits asking Cogburn if he had read the company literature and telling him he did not think the Union would do him any good. Simmons does not deny asking Cogburn what he thought the Union could do for him, but testified that Cogburn named a few items he thought the Union could get. He did not recall the items,

[9] The foregoing findings are based on Cogburn's credited testimony.

but stated that "whatever it was, was ridiculous." Simmons testified that he told Cogburn the Company would not give more than it could afford and that if the union got in, "and they got a strike that we'd all, may lose our jobs." Simmons testified he did not believe he asked Cogburn how he was going to vote because he already knew.[10]

Although the foregoing incident is alleged in the complaint only as a threat of plant closure, in view of the fact that the entire conversation was fully litigated at the hearing, in addition to a threat of plant closure, I find and conclude that there was coercive interrogation and a threat that the Respondent would not bargain in good faith.

The complaint alleges that on or about June 17 Supervisor Philip Crosby coercively interrogated employees concerning their union activity and that on or about June 8 and 15 Supervisor Bill Warren interrogated and restricted an employee to his work area to induce the employee not to support the Union. The General Counsel attempts to support both allegations by the testimony of John D. Williams, whom, heretofore I have not credited when his testimony was at odds with credible testimony. With respect to the allegation of interrogation there is little conflict between the testimony of Williams and Crosby. The findings in this regard are based on Crosby's testimony. The first part of June, Williams reported to work with a new "pocket protector" and a new "pen," each bearing the I.A.M. logo. Crosby went to Williams and told him he knew he was involved in the Union, and he hoped it would not interfere with his inspection, and that he would not be doing anything on *Company* time involving the Union. Williams replied that the fact he had the I.A.M. protector and pen did not mean he was for or against the Union.

The Respondent argues, as to this incident and all the 8(a)(1) allegations discussed below, that such incidents are innocuous and isolated and do not rise to the level of unfair labor practices or objectionable conduct when addressed to known union supporters. In *PPG Industries, Inc., Lexington Plant Fiber Glass Division*, 251 NLRB 1146 (1980), the Board recently reaffirmed its position that inquiries which probe into employee's union support reasonably tend to coerce employees even when addressed to those who have openly declared their union sympathies, and as it held in *Pasceo, a Division of Freuhauf Corporation*, 237 NLRB 399 (1978), and *Anaconda Co.—Wire and Cable Div.*, 241 NLRB 1091 (1979), even in the absence of threats of reprisals or promises of benefits. In doing so, the Board specifically overruled its Decision to the contrary in *Stumpf Motor Company, Inc.*, 208 NLRB 431 (1974), and *B. F. Goodrich Footwear Company*, 201 NLRB 353 (1973).

Accordingly, I find that Crosby's comments to Williams concerning his involvement with the Union as indicated by his union-inscribed pocket protector and pen constitutes coercive interrogation and his admonishing him not to do anything concerning the Union on company time constitutes an unlawful broadening of the no-solicitation rule.

With respect to the Warren incident, Williams testified that in June he was in the area of the "NC checker" which was supervised by Bill Warren. Warren approached Williams and told him that he knew he had been talking about the Union to employees in that department—"he was not saying that I was doing it then, but that I had been," and that, since the machine was set up, no inspection personnel was required and he should leave the area. According to Williams, a patrol inspector, he normally had occasion to be in that area three or four times a shift and had never been told to leave before. Warren did not testify.

While Williams testified to the reason he was in the area, he does not contend that his presence there was for a legitimate reason once the machine was set up. Also Williams did not deny to Warren that he had been talking with employees about the Union while on that end of the plant as Warren had accused him.

Even in the absence of a denial or explanation by Warren, I find and conclude that the General Counsel has failed to sustain the allegation that this incident violates the Act.

The complaint alleges that, during May, Supervisor Donny Titsworth interrogated employees concerning their union activities. The testimony of Paul Herrman is presented in support of this allegation. Herrman testified that about once a week during May and June Titsworth came to his desk and asked him how he felt about the Union, whether he was for or against it. On another occasion Titsworth asked him if he had made up his mind and showed him a factsheet prepared by the Company for supervisors. On one occasion Titsworth asked if he had read that the average strike at U.S. Motors was 8 weeks and if he were still going to go for it.

Titsworth admitted having several conversations with Herrman during May and June where the subject of the Union came up, but did not state who initiated such subject. According to Titsworth, Herrman seemed unsure about the Union and Titsworth invited Herrman to ask him any questions that he wanted and if he did not know the answer he would find out. He also admitted that he showed Herrman the supervisor's fact book about the Union and Herrman told him he had already "looked into it," and had "decided he was going to go with the union."

As heretofore noted, the demeanor of Herrman testifying under oath was not favorable in large part, whereas Titsworth's testimony had a ring of truth. While Titsworth specifically denied that he asked Herrman how he was going to vote in the election or how he felt about the Union, his testimony was very general with respect to how the subject of the Union was initiated into their discussions. In any event, the Board has held that, where supervisors engage employees in conversations about a union where such conversations are designed to ascertain their union sympathies, such conduct constitutes coer-

[10] As noted above, I credit Cogburn's more cogent and detailed version of this conversation. Simmons' recollection of the conversation was vague and to an extent inconsistent. For instance, he testified that he did not know whether Cogburn mentioned specific benefits, but added, "whatever it was, was ridiculous." Similarly, he could not recall whether Cogburn said he had read the company literature, but added, "[A]nyway, he didn't believe it."

cive interrogation whether or not couched as an interrogatory.

Accordingly, on the facts here, Titsworth's engaging Herrman in conversations about the Union on several occasions and offering to obtain answers to any questions he might have, were clearly designed to ascertain his union proclivity and convince him to the contrary. Thus, while there were no threats of reprisals or promises of benefits in connection therewith, I find under the rationale of *PPG Industries, Inc., supra*, that such conduct violated Section 8(a)(1) of the Act.

The complaint alleges that, in September, Supervisor Pete Oliver interrogated employees concerning their union activity and solicited employees to persuade fellow employees not to support the Union. Testimony in support of these allegations was elicited from James Fletcher.

According to Fletcher, he was hired by the Respondent for the second time in August by General Foreman Pete Oliver and Personnel Manager Bob Irish. During the employment interview, Fletcher told Irish that he understood the Union was trying to get into the plant again and Oliver replied that they did not need a union, that it would be the worst thing they could have. I find that Fletcher volunteered to Oliver that he had voted against the Union in the last election. According to Fletcher, Oliver then asked him to talk to his brother who was also an employee at USEM.

According to Oliver, whom I credit,[11] he interviewed Fletcher for a job and, after hiring him, Fletcher commented on a place that he had worked in Oklahoma where the union was campaigning. Oliver told him of the current campaign at USEM at which time Fletcher volunteered that he did not vote for the Union the last time. Oliver replied he was glad to hear that and hoped he felt the same way this time, and he hoped his brother felt the same way. Fletcher volunteered to talk to his brother and Oliver said that would be appreciated. Fletcher did not complete a new employment application on this occasion.

On the facts as found here, the General Counsel has failed to sustain his burden of establishing by a preponderance of evidence that the Act was violated during this employment interview. It was Fletcher, the applicant, not Oliver, the supervisor, who injected the Union into the conversation. Fletcher volunteered his union sentiments during the last election, and Oliver's comment that he hoped he felt the same way "this time" falls short of interrogation. Similarly, Oliver's telling Fletcher that he would appreciate Fletcher's volunteered service of talking with his brother falls short of soliciting him to persuade his brother not to support the Union.

The complaint alleges that, on or about October 3, Supervisor Charles Vaught unlawfully interrogated employees concerning their union activities and that during July he coerced employees by telling them that if the Union were voted in it would never get a contract and that the Company would pay as much without a union just to keep it out.

The interrogation allegation is based on the testimony of Maxine Bates who testified that, on October 3, Vaught came to her table and after greeting her asked, "[W]ell how is the election going on Friday?" She replied, "We'll know Friday." Vaught then asked, "[a]re you for the company or are you for the union?" She replied that it would not be a secret ballot if she told him.

Vaught admitted to the interrogation of Bates on a number of occasions during the campaign, testifying that they had been friends for a long time and she made no secret of how she felt about the union. He testified that he asked her if she had decided to vote for the Company and admitted asking her how the election was going to go. The foregoing clearly constitutes unlawful interrogation under *PPG Industries, Inc., supra.*

The remaining two allegations with respect to Vaught are based on the testimony of James Bowling. Bowling testified, which testimony is not disputed by Vaught, that Vaught came to his work station and told him that Partain had asked him to talk with him and instructed Bowling to accompany him to Supervisor John Holomshek's office. Although the record is not clear, it appears that employee Laren Dean had reported that Bowling had talked with him about the Union on working time. Vaught apparently told Bowling this and Bowling admitted that a conversation with Dean had gotten around to the Union and told Vaught he would not do it again. According to Bowling, Vaught then alluded to the problems the Milford plant employees had with the union and told him the Company would pay the employees as much as they could get with the Union just to keep the Union out.

Vaught admitted the foregoing except that he testified that he told Bowling the Company would pay as much as it could afford to pay, with or without a union.

Vaught's testimony is far more credible than that of Bowling, whose testimony was not altogether lucid or cogent. Accordingly, I credit Vaught, and find that his comment that the company would pay as much as it could afford with or without a union is not coercive and does not violate the Act. Bowling gave no testimony concerning a threat that the Union would never get a contract. Accordingly, these allegations are dismissed.

The complaint alleges that Supervisor John Holomshek, during June, threatened employees with the loss of benefits and wages if the Union were voted in. This allegation is based on the testimony of Willard Richardson and Stanley House. According to Richardson, some time in June, Holomshek accompanied him to the office of Supervisor Paul Havens where Havens discussed with him unions in which Havens had been a member.[12] As Richardson and Holomshek were returning to Richardson's work area, Holomshek told Richardson "that if the people out there asked for a dollar an hour increase, the plant would close down."

Holomshek, who left Respondent's employ on July 28, testified with respect to this incident, that, as he and

[11] Fletcher's testimony is disjointed and, at times, incoherent, which indicates that he had little present recollection of what was said at his employment interview. He had to be led by the General Counsel into making some of the most critical statements.

[12] Havens' conduct is not alleged as an unfair labor practice.

Richardson were returning to Richardson's work area, Richardson made a statement to the effect that the Union would get them a $1-an-hour increase. Holomshek replied that Emerson was a pretty big outfit and in business to make money and if it came to the point where the plant would lose money by granting an across-the-board increase of $1 an hour, he "would imagine they would think seriously about closing it down." I credit Holomshek's more detailed version of this incident. While I do not believe that Richardson was deliberately bearing false witness, I am convinced that his version failed to reveal all the surrounding circumstances of the conversation. If Holomshek's remarks constitute a violation of the Act, it is not a threat of loss of benefits, as alleged, but a threat of plant closure. However, the issue was fully litigated without objection and will be considered under the criterion of threat of plant closure. In my opinion, Holomshek's remark, that, if the plant lost money by having to give a $1-an-hour increase, he thought Emerson would think seriously about closing it, is not an unlawful threat of plant closure. This statement is similar to that of the employer in *Loomis Courier Service, Inc.*, 235 NLRB 534, (1978), "that it would close the branch should the Union insist on demands that would cause a marked increase in costs." In that case, as here, it appears that the branch was already in a somewhat precarious economic situation. The Board found the respondent's statement to be lawful. Here, Holomshek was merely expressing his opinion of an option he thought Respondent might consider if wage demands made the plant unprofitable.

According to Stanley House, who was apparently a close personal friend of Holomshek, one day in June as he was returning from lunch Holomshek looked at him and shook his head and said, "I can't believe this." House asked what, and Holomshek said, "I can't believe you are mixed up in this union deal." House asked what was wrong with it, and Holomshek said, "[W]ell . . . you know you're going to lose everything you've got . . . . You're going to go back to zero and everything starts all over again."

Holomshek admitted a conversation with House about the Union where they discussed negotiations, bargaining, and contracts. He told House negotiations start at zero and fluctuate up and down from there.[13] He testified that he told House that the Union could possibly bargain away some of the benefits they already had "in order to gain something they really have their mind set on."

Holomshek was a very impressive witness and I credit his version of this incident over that of House, who testified that he made notes of the conversation and turned them over to the Union. The Union claimed the notes were in Dallas, Texas, and were not available at the hearing for purposes of cross-examination. Whether statements of "bargaining from scratch" or from "zero" are unlawful depends on the context in which they are uttered. Generally, where, in context, the term indicates that existing benefits will be lost or reduced and the union must bargain to regain them, the statement is unlawful. However, where the statement indicates bargaining will start with all present benefits and some may be lost as a result of bargaining, the statements are lawful. Here, Holomshek explained what he meant by saying the Union could bargain away present benefits in order to get "something they really have their mind set on." Accordingly, I find this allegation has not been sustained and will recommend that it be dismissed.

The complaint alleges that in August Supervisor Rick Selby threatened employees that if the Union were selected at the Mena plant the Company would have to make an example out of it to keep the Union out of its other plants, and, as amended at the hearing, that on or about October 2 Selby interrogated an employee concerning his union activities.

Turning first to the alleged interrogation, James Craig Pate testified that, on October 2, Selby came up to him and said, "How are you doing Pate?" Pate replied, "[A]lright except for the wrestling [sic] [hassling], I'm catching back here." According to Pate, Selby talked on for awhile and then said, "[Y]ou ain't going to vote for that union are you?"

Selby admited a conversation with Pate on October 2, where he asked Pate, a known union adherent,[14] how things were going. Pate told him he wanted to talk with him and complained about "people riding [me] back there." Selby asked why he thought they were riding him and Pate said because he was going to vote for the Union. Selby told him he had a right to vote as he wanted and that others had a right to their opinion.

I cannot credit Pate's version of this incident based on his testimony at the hearing. In October, prior to the hearing, Pate gave affidavits to the General Counsel and the Respondent wherein he stated only that Selby asked him how he was doing and he volunteered that he was going to vote for the Union. Apparently, only a week or so before the hearing, he told counsel for the General Counsel that Selby had only asked how he was doing. It was not until the hearing that he remembered that Selby had asked how he was going to vote in the election. Accordingly, I cannot credit him. I find no unlawful interrogation in Selby's version of this incident and recommend that it be dismissed.

On the evening of the day in August when the election agreement was signed, Selby went to the local Elks Lodge where he encountered employees Richard Milligan, Mel Epperson, and Ray Baker and informed them that the date had been set for the election. Milligan observed that he was glad it had finally come. According to Milligan, Selby talked about a union plant in which he had once worked and how he got to work when there was a strike. Selby also asked how they would feel if their children were starving. Apparently the Union was the chief topic of discussion. Later, again according to Milligan, Selby said, "[W]ell, there's one thing about it, that if this plant goes Union here . . . well, they'll have to make an example out of this plant being Emerson in order to keep the rest of their plants from going Union." Neither Epperson nor Baker testified.

[13] Holomshek testified that he meant bargaining would start from where they were. However, he does not contend that this is what he told House.

[14] Pate had I.A.M. stickers on his person and work station.

Selby testified that Milligan complained about his pay and having to drive an old car and said he thought it was time all that changed and that the Union would get them a $1 or $2 raise. Selby replied that he did not think that would happen and that Emerson had a lot of other plants and the Mena plant would be judged along with the others for profitability. He continued that the Mena plant was "having a crucial time," and there were a lot of other plants to be looked at and judged before anything happened. Selby said in his opinion they could not afford to give everything the people said they wanted.

In my opinion, neither Milligan nor Selby deliberately prevaricated in reciting their recollection of what was said in this "bar" talk. As Respondent observed in its brief, from their testimony both Milligan and Selby appeared to be "big talkers." Selby's emphasis on the fact that Emerson had a great many other plants, which were known by all to be both union and nonunion, against which the Mena plant must be judged might well have suggested to Milligan that Selby was indicating that Emerson might make an example out of the Mena plant. In the context in which this discussion occurred, I am convinced, and I find, the statements were not coercive and did not violate the Act.

The complaint alleges that in September Supervisor La Dayrl Knight threatened employees that the Company would not negotiate with the Union and that employees would be discharged because of their union activities.

These allegations are based on the testimony of Kenneth Halcomb that near the end of his shift on an evening in September La Dayrl Knight walked up to him and, without any greeting, told him "that the company would not negotiate with the Union." Knight continued that "they would have to go on strike, and that he had a list of all the employees involved, that when we went on strike, the company would hire people to replace us." This, according to Halcomb, was the entire conversation.

According to Knight, his routine was to tour the plant early in the shift, and on one occasion he stopped and talked with Halcomb, with whom he had been friends for several years. Halcomb asked Knight if the Company was going to negotiate with the Union. Knight told him that Respondent would have to negotiate. Halcomb responded that, if Respondent did not negotiate, the employees would go on strike and shut the plant down and there was nothing the Company could do about it. Knight told him that he did not think the employees would force the issue by striking and if they did the Company would hire employees to replace them.

I am constrained to credit Knight's more detailed and believable version of this incident. Halcomb's version is not appealing. I find it highly unlikely that Knight would approach his friend and, without greetings, make the statement attributed to him. Accordingly, I recommend that this allegation be dismissed.

At the hearing the General Counsel was granted permission to amend the complaint to allege that on or about May 14, 1979, Respondent by its supervisors, Joel Anderson and L. J. Dugan, violated Section 8(a)(1) and (4) of the Act by threatening its employees with loss of holiday pay if they participated in the instant hearing on May 29, 1978. At the hearing I dismissed this allegation as to L. J. Dugan for failure of proof.

This incident arises out of company policy, not uncommon in industry, that for employees to qualify for holiday pay they must work the day before and the day following the holiday, or be excused for good cause. The hearing herein commenced on May 28, the day following the Memorial Day holiday, on which the plant did not operate. According to A. D. Davis, on or about May 14, he approached Walt Brotherton, production manager, and, because of rumors he had heard, told Brotherton he was involved in this hearing and asked if he would receive holiday pay. Brotherton told him he did not know but he would check with personnel and find out. A short time later Davis advised his supervisor, Joel Anderson, that he was involved in the hearing. Anderson told him, "You know you may not get your pay, your holiday pay." Davis told Anderson he thought he was misinformed, and that he had already talked with Brotherton.

On Friday, Supervisor Jim Foley told Davis, a second-shift employee, that he would receive his holiday pay if he reported to work at the conclusion of his business at the hearing. It appears that the first-shift employees who were subpoenaed for the 1 p.m. hearing were required to report for work until noon in order to qualify for holiday pay.

I find nothing unlawful in Anderson's comment to Davis. At most these discussions indicate that some supervisory personnel were not familiar with the holiday pay policy nor aware that the Board-issued subpoena constituted an excuse for holiday pay. Accordingly, this 8(a)(1) and (4) allegation is hereby dismissed.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth above, in connection with its business as set forth in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. Jurisdiction by the Board is properly asserted in this proceeding.

2. By interrogating its employees concerning their union membership, activities, and desires; threatening its employees, directly and indirectly, that it would close the Mena plant if the Union were selected as the employees' collective-bargaining representative; telling its employees, directly or indirectly, that selection of the Union at Mena would inevitably bring strikes and violence; orally promulgating an overly broad no-solicitation rule which could be interpreted as prohibiting employees from working for the Union on their breaks and lunch period; and threatening its employees that it would be futile to select the Union by telling them it would not bargain with the Union in good faith, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

3. Respondent has not otherwise violated the Act.

4. The conduct of Respondent set forth above occurring between August 26 and October 6, 1978, considered in conjunction with the unfair labor practices occurring during the union campaign prior to August 26, requires that the Board-conducted election held on October 6 in Case 26–RC–5823 be set aside and that a new election be directed to be held at a time to be determined by the Regional Director for Region 26, after the effects of the unfair labor practices found herein have been remedied.

THE REMEDY

Inasmuch as Respondent has been found guilty of violations of Section 8(a)(1) of the Act, which conduct interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them by Section 7 of the Act, I conclude from the totality of such unlawful conduct that Respondent should be required to cease and desist from such and any like or related conduct, and to take certain affirmative action in effectuation of the policies of the Act. Such affirmative action of Respondent shall be that it post the usual informational notice to employees, attached hereto as an appendix.

[Recommended Order omitted from publication.]